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In the Supreme Court of the United States

OCTOBER TERM, 1978

MCAX SIGN COMPANY, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 576 F. 2d 62. The Board's decision and order (Pet. App. 1d-2e) are reported at 231 N.L.R.B. No. 158.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1b-2b) was entered on August 1, 1978. A petition for rehearing was denied on September 21, 1978 (Pet. App. 1c-2c). The petition for a writ of certiorari was filed on November 20, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether substantial evidence supports the Board's finding that the company had indicated its intent to be

bound by the collective agreement negotiated between the union and an employer group so that its refusal to execute the agreement violated Section 8(a)(5) and (1) of the National Labor Relations Act.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, are as follows:

> Sec. 8. (a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> * * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

STATEMENT

1. Petitioner ("the Company") has been a party to three successive two or three-year collective bargaining agreements with Local 59, International Brotherhood of Electrical Workers, AFL-CIO ("the Union"), between 1968 and 1976. The agreements stated that they were between the Union and the Neon and Electric Sign Companies of Dallas, Texas ("NESCDT"), but were signed by the several contractor companies (Pet. App. 2d-3d).

Sixty days prior to the June 30 expiration of the 1973-1976 contract, the Union received proposed changes from two of the four contractor signatories. Thereafter, representatives of the four contractors, including the Company, met with a representative of the Union, Herbert Hicks, in a series of six bargaining sessions (Pet. App. 3d). At the second meeting, the contractors agreed to drop their separate proposals, and instead " 'try for a package to present [to the Union] covering all parties involved' "

(Pet. App. 7d; GCX 9B; Tr. 16).[1] At the third meeting, the contractors' joint proposal was presented (Pet. App. 7d; GCX 9C; Tr. 36-37); and thereafter it was discussed as a unified proposal on behalf of all the contractors (Pet. App. 7d; Tr. 72). By the end of the sixth meeting, on June 22, all differences between the Union and contractors had been resolved, except that the journeyman wage increase offered by the contractors was ten cents less than that demanded by the Union. Hicks announced that the contractors' wage proposal was unacceptable and suggested engaging a mediator for the next meeting (Pet. App. 3d; Tr. 45).

The next morning, a member of the contractors' committee called Hicks and requested that the parties "get back together." He told Hicks that they weren't "too far apart" and that he thought "we can work out the differences" (Pet. App. 3d; Tr. 17, 46). Because the Union's membership meeting was scheduled for the night of June 28, it was agreed to have a negotiating meeting on the 28th so that the contractors' proposal could be submitted to the membership for ratification (Pet. App. 3d; Tr. 46). When Company representative Donald Simpson was notified of the scheduled meeting, he informed the Union by special delivery letter that he could not attend because he had made other business appointments for that day (GCX 10; Tr. 195-196). On June 28, at a meeting attended by all of the contractors except the Company, agreement was reached on a new contract and that night the union's membership ratified the contract (Pet. App. 4d).

On July 2, in accordance with past practices, Hicks mailed to each contractor a copy of the changes agreed to (Pet. App. 4d; Tr. 18-19). Thereafter, each of the

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[1] "Tr." references are to the transcript of the unfair labor practice proceeding; "GCX" references are to the General Counsel's exhibits therein.

contractors, except the Company, notified the Union by mail or telephone that the changes described in the letter were as agreed to in negotiations (Pet. App. 4d; Tr. 19). Since no reply had been received from the Company, Hicks attempted to reach Simpson by telephone in mid-July, but was unsuccessful (Pet. App. 4d; Tr. 57-58). On July 22, the Union wrote to Simpson, notifying him of the change in the rate of pay for journeymen which had been agreed to by "the Joint Labor-Management Committee" and which was effective July 1. Hicks also advised the Company to take "immediate action" to comply with the new contract if it had not done so. (Pet. App. 4d; Tr. 58; GCX 12.) The Company did not reply to this letter.

On July 29, Hicks finally reached Simpson by telephone. Simpson told Hicks that he had not had the opportunity to review the changes, but would do so and call Hicks the next day. (Pet. App. 4d; Tr. 61-62.) Simpson never called, and, on July 30, Hicks hand delivered a copy of the new contract to the Company's office (Pet. App. 4d; Tr. 62). On August 2, Simpson wrote the Union that the Company would refuse to sign the agreement because, "[a]fter long and careful review, we find that to become a party to the agreement in question would seriously impair our opportunity for healthy fiscal operation * * *" (Pet. App. 4d; Tr. 63; GCX 13). Simpson also stated that the agreement was unacceptable because it failed to include changes requested by the Company and included changes to which it had not agreed (*ibid.*).

2. The Board, adopting the decision of the Administrative Law Judge, found that the Company violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1), by failing and refusing to execute or become party to the collective bargaining agreement negotiated with the Union by the multiemployer group to which the Company had delegated bargaining authority (Pet. App. 8d, 11d, 1e-2e).

The Law Judge noted that, "[w]hether [the Company] was obligated to sign [the] agreement depends on whether or not [it] had indicated an unequivocal intention to be bound in collective bargaining by group rather than individual action" [footnote omitted] (Pet. App. 5d). In finding that the Company did have such an intention, the Law Judge rejected the Company's contentions that the lack of a "formal association structure binding the bargaining participants," and the fact that the contractors submitted separate proposals to the Union and had no authorized spokeman, negated a finding of intent to be bound by group action (*ibid.*).

The Law Judge explained that (Pet. App. 6d):

> [T]he absence of evidence of a formal delegation of authority by [the Company] to the contractors engaged in negotiations with [it] and the absence of any evidence that NESCDT had any formal structure do not preclude a finding of the requisite unequivocal intention. The objective facts appearing in the record are that for a number of years [the Company] and the other contractors referred to above, have negotiated jointly and have been cosignatories to a single contract. While NESCDT did not have any existence in the sense of having a constitution and bylaws, membership requirements, a place of business and the like, its name did appear on the contracts which [the Company] and [its] fellow contractors have signed for years as the "Employer" and it may reasonably be inferred that its use reflected the fact that those contractors had agreed to act jointly.

The Law Judge also relied on the fact that, after the first meeting, "the contractors consolidated the separate proposals into a single set of proposals which formed the basis of negotiations thereafter" (Pet. App. 7d). The Law Judge further noted that during negotiations the Com-

pany representative Simpson did not "assert a position independent of the group position [or tell] the Union [that] he reserved the right to reject any contract that did not include his proposals" (Pet. App. 7d). Nor did Simpson, when the Union first requested that he sign and return the contract, "assert that he was not bound" (Pet. App. 7d-8d).

The Board ordered the Company, *inter alia,* to execute and honor the agreement negotiated by the multiemployer group and the Union and make whole its employees for loss of earnings or benefits suffered because of the refusal to honor the contract (Pet. App. 9d-10d, 12d).

3. A divided court of appeals concluded that the Board's finding that the Company manifested an unequivocal intent to be bound by group action was supported by "substantial evidence" (Pet. App. 1a). It therefore upheld the Board's decision and enforced its order (Pet. App. 11a).

The court stated (Pet. App. 6a-7a):

> It is well established that the requisite intent may be inferred from a prior history of multi-employer bargaining and the adoption of uniform contracts. [Citations and footnote omitted.] In this case, the prior dealings of the parties and the course of conduct during the 1976 negotiations amply supported an inference of unequivocal intent to be bound by group action. * * *

The court also noted that (Pet. App. 8a-9a):

> So far as the record discloses, the first time that McAx took the position that it was not bound by group action was on October 1, 1976, in response to a complaint filed against it by the regional office of the N.L.R.B. pursuant to charges filed by the Union *after* Simpson refused to sign the contract.

> Without a single indication to the contrary, the activities of Simpson, McAx's chief executive officer and designated bargaining agent in the ongoing multi-employer contract negotiations with the Union, all point inexorably and inescapably to the conclusion that his belated disclaimer to be bound by the joint negotiations was no more than an afterthought, perhaps as a result of consultation with counsel. * * *

ARGUMENT

Although multiemployer bargaining is consensual, it is settled that, where there has been a delegation of bargaining authority to a multiemployer group, an individual employer must sign and adhere to any agreement reached. *National Labor Relations Board* v. *Beckham, Inc.*, 564 F. 2d 190, 194 (5th Cir. 1977); and see *National Labor Relations Board* v. *Strong Roofing & Insulating Co.*, 393 U.S. 357, 359 (1969). It is also clear, as the Law Judge noted (Pet. App. 6d), that the requisite unequivocal intent to be bound by the action of the group

> will not be made to depend on the presence of a formal associational structure among the bargaining participants or on the formal delegation of authority from the individual employer to the multiemployer group. Nor will the Board, faced with outward manifestations of intent to engage in group bargaining, consider as controlling an employer's private manifestations of dissent. An employer who, through a course of conduct or otherwise, signifies that it has authorized the group to act in its behalf will be bound by that apparent creation of authority. [*Custom Colors Contractors,* 226 N.L.R.B. 851, 853 (1976); enforced *sub nom. National Labor Relations Board* v. *Beckham, Inc., supra*; footnote omitted.]

Petitioner does not dispute these principles. Rather, it simply argues that substantial evidence does not support the Board's finding, upheld by the court of appeals, that on this record the requisite intent to be bound was shown. That contention raises no issue warranting review by this Court.[2] *Universal Camera Corp* v. *National Labor Relations Board,* 340 U.S. 474, 491 (1951).

In any event, the record amply supports the Board's findings.[3] Petitioner essentially argues (Pet. 6-14) that the Board should have given controlling weight to the fact

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[2]*Van Eerden Company,* 154 N.L.R.B. 496 (1965), on which petitioner relies (Pet. 5-7), is distinguishable. In that case there was extensive evidence "indicating that the parties did not intend to accept the obligations and benefits of multiemployer bargaining." *Id.* at 499. Thus, the employers in *Van Eerden* had a standing agreement "that all negotiations were to be on an individual, rather than joint, basis, and that no agreement by one firm would bind the others." *Id.* at 498. Furthermore, there was testimony from the other employers that each company retained the right to bargain independently. In addition, in that case, the union's negotiator admitted that he knew that he was dealing with the employers on an individual basis and that the employers could terminate participation in the group negotiations "at any time," even after negotiations had commenced. *Id.* at 500. No such evidence was presented here.

[3]As shown in the Statement (*supra,* pages 2-4), since 1968, the Company and the other sign contractors, known as "NESCDT," have negotiated on a unified basis and each has cosigned the successive contracts arrived at in group negotiations with the Union. In addition to the history of group action, negotiations in 1976 also clearly communicated to the Union the intention of the NESCDT contractors to participate in multiemployer bargaining. Thus, while negotiations began with separate proposals from three of the four contractors, at the second meeting the contractors, including the Company, agreed to present a single "package" proposal on behalf of "all parties involved." At ensuing bargaining sessions, the contractors, including the Company, discussed only the package, and progress toward a contract was made on that basis. Finally, when, on July 22, Hicks informed the Company that it should be paying the ten cents an hour increase to journeymen, the Company again did not claim that it was not bound by the contract, nor did it do so when Hicks spoke to Simpson on July 29. As the court of appeals properly noted, the failure of the Company to assert that it had not intended to be

that negotiations were opened by submission of individual proposals from the contractors. However, as the Board found, those proposals never served as the basis for negotiations nor did Company negotiator Simpson ever insist upon, or even ask for, consideration of its individual proposals during the negotiations. The only negotiations conducted on behalf of the Company were those conducted for the contractors as a group.

Nor is there merit to petitioner's contention (Pet. 14-17) that the Board's findings improperly rest on an inaccurate interpretation of the contract. The Board did not find that NESCDT denoted any formal group, but merely concluded that its use signified that the individual signatories considered themselves to have a group identification.

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bound by the contract is strong additional evidence supporting the Board's finding that the Company's ultimate refusal to sign the contract represents "a belated attempt to avoid the legal consequences of its past conduct."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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